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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. PAUL ANTHONY HEWITT, Defendant and Appellant.	A140746 (San Mateo County Super. Ct. No. SC074519A)

Defendant and appellant Paul Anthony Hewitt appeals from his conviction, following a jury trial, of five counts of lewd acts with a child under the age of 14 (Pen. Code, § 288, subd. (a)).[1] He argues the admission of expert testimony on Child Sexual Abuse Accommodation Syndrome (CSAAS) was error; the trial court erred in failing to examine jurors about alleged prejudicial misconduct; the prosecutor committed misconduct during closing arguments; trial counsel was ineffective; and the evidence was insufficient to support an order requiring him to submit to AIDS testing. We agree with appellant's last contention, but otherwise affirm.

BACKGROUND

The evidence at trial was as follows. Natalie Doe[2] was born in August 1997. In 2008, at the time of the charged crimes, appellant was dating Natalie's mother (Mother)

[1] All undesignated section references are to the Penal Code.

[2] In the trial court record, her first name is spelled both Natalie and Nathalie. For consistency, we will refer to her as Natalie.

and living with Mother, Natalie, and Natalie's older sister Jocelyn. Natalie and appellant had a good relationship.

The Lewd Acts

On the evening of May 17, 2008, appellant, Mother, Natalie, and Natalie's cousin returned home after a family gathering. Natalie testified that she fell asleep in the car. She awoke when appellant picked her up and carried her to the room she shared with Jocelyn. Appellant put Natalie in her bed. Jocelyn was at a sleepover that night, and Mother put Natalie's sleeping cousin in Jocelyn's bed.

Natalie fell asleep again, then awoke when appellant opened the bedroom door and entered the room. She heard the shower running and thought Mother was taking a shower. Natalie was lying on her side facing the wall, and appellant began rubbing Natalie's back over the blankets. He then moved his hand lower until it was rubbing her bottom, still over the blankets. Natalie felt very uncomfortable but did not say anything. Appellant next moved his hand under the covers and inside her underwear, and began rubbing her vagina. Natalie rolled over, pretending she was sleep, and appellant's hand came away from her body, but after a short period he put his hand on her vagina again.

Natalie then heard the shower turn off and appellant ran out of the room. After the bathroom door opened, Natalie heard appellant and Mother talking and the shower turned on again. Appellant returned to Natalie's room and touched her vagina again. The shower turned off and again appellant ran out of the room. He did not return. Natalie did not immediately tell Mother what happened because she thought it would make Mother mad because she was engaged to appellant.

Mother testified that on the night in question, after she and appellant put Natalie and her cousin to bed, she went to the bathroom to clean her feet. She left the bathroom to get something from the hallway and saw appellant on the couch in the living room, apparently asleep. Mother returned to the bathroom and spent about five more minutes washing her feet. She then turned off the water, dried her feet, and left the bathroom. She saw appellant leaving the girls' bedroom. She asked what he was doing and he responded that "he was just checking on the girls."

The Next Day

Natalie testified that the next morning, she told Jocelyn appellant had rubbed her "inside" her underwear more than once. Jocelyn told Natalie not to tell Mother but just to wait and see whether appellant tried to touch her again. Jocelyn testified that Natalie was "really upset" and crying. She testified Natalie told her in detail about the incident.

Natalie testified that later that day, she decided to tell Mother what had happened. Appellant was not home at the time. After Natalie told her mother, Mother left to talk to appellant; when she returned she told Natalie appellant said "he didn't do it." Eventually Mother seemed convinced that Natalie was telling the truth. Mother asked Natalie if she wanted to tell the police, in which case she would have to tell several people and probably go to court. Natalie did not want to tell others or go to court, so she told Mother that she did not want to tell anyone else.

Mother testified that after Natalie told her what happened, she confronted appellant. Appellant said he did not remember anything from the night before because he was drunk. Mother responded that he had not drunk that much. Mother told appellant she believed Natalie and appellant began crying and apologizing, but denied that his apologies were an admission of guilt.

The Following Year

Natalie testified that sometime after the incident appellant told her he was "sorry for what he had done and that he shouldn't have done it." Over the following year, appellant continued to live with Natalie and her family, although Natalie avoided appellant. Eventually, the relationship between appellant and Mother ended and appellant moved out. At some point thereafter, Natalie overheard Mother tell appellant "she wouldn't tell the police" if appellant registered a certain car under her name.

Mother testified she did not believe she could have supported her family if she had left appellant in May 2008.[3] Moreover, appellant knew Mother did not have "papers"

[3] On cross-examination, Mother admitted she had independently supported her family before appellant came into their lives and she knew how to do so in 2008.

and told her he could get her deported. Mother felt stuck. After appellant left, Mother struggled financially. She testified appellant owed her approximately $20,000 and agreed to pay her rent for six months and then give her the rest in cash. In December 2009, after appellant had paid six months of rent, he told Mother he did not have the rest of the money. She told him to sign over his car to her and that would satisfy the debt. When appellant said he would think about it, Mother told him, "I can go to the police and make you pay." Mother testified she meant she would contact the police about appellant's debt, not about molesting Natalie.

The Police Investigation

Around January 2010, Natalie was at a friend's house when a 14-year-old boy pinned her down and tried to kiss her. She eventually was able to push him off. In February, Natalie told some friends what the boy had done because she "couldn't hold it in anymore." In March, Natalie told one of her teachers about the incidents with the boy and with appellant. The teacher reported what Natalie had told her to the police.

The police began investigating. Mother agreed to meet with appellant while wearing a hidden microphone and to conduct recorded pretext calls. Natalie initially did not want to conduct pretext calls, but later agreed to do so. During one of these recorded conversations,[4] appellant told Mother he had only "poked [Natalie] in her butt just like the family always did when somebody had their butt sticking up in the air just for laughs." In a subsequent conversation he said, "I did something that shouldn't have been done. I regret it for the rest of my life. I have to live with that. Whether [Natalie] forgives me or not I have to live with that." He told Natalie, "I don't know if you ever can forgive me. I just um, I don't know what to do to make it right or how I can help you feel better about yourself. I mean I made the mistake by you know the curiosity, but that's, that's all I can think of. That's all I've been banging my head about, is thinking about, and I don't know how I can make it better for you. . . . I just deeply am sorry that

[4] Some of the recordings were played for the jury; all were admitted into evidence along with transcripts.

it ever happened . . . ." Later, when Natalie said, "you touched parts of my body where you shouldn't have touched in the first place, and that's just incredibly hard to ever forget for me," appellant responded: "I don't know what to say. . . . It's my mistake and I have to pay the price for it the rest of your life as you have to pay the price for um, the situation. Alright. I'm sorry Natalie, and like I said I don't know what I can do to make it up to you, or make it better." He subsequently added, "I feel like throwing up. I'm sorry, and I don't want you to ever go through anything like that again . . . ."

As discussed in detail below, the prosecution also presented expert testimony on CSAAS.

Defense Case

The sole defense witness was a licensed psychologist who works with sexually violent predators. The psychologist interviewed appellant and reviewed his criminal record, police reports, and transcripts of the pretext calls. She concluded appellant had no diagnosable mental disorder and no sexual attraction to prepubescent or pubescent children. While expressing no opinion on appellant's guilt or innocence, she opined it was highly unusual for an individual with no history of prior misconduct or possession of child pornography to be accused for the first time in middle age, because overt misconduct usually begins much earlier in life.

DISCUSSION

I. *CSAAS*

Appellant challenges the CSAAS testimony on a number of grounds. For the reasons set forth below, we reject this challenge.

A. *Relevant Background*

Prior to trial, appellant moved to exclude expert testimony on CSAAS on the ground that no myths or preconceptions existed in this case, the subject was not outside common knowledge, and any such testimony would deny him due process. The prosecution argued CSAAS testimony was relevant to show Natalie's accommodation in continuing to live with appellant and her intermittent disclosure of details. With respect to the latter, the prosecutor represented that Natalie did not completely disclose the full

details of the incident when she talked to Mother and Jocelyn the day after it happened. Defense counsel did not contest this representation. The court found the evidence admissible on the two grounds identified by the prosecution.

At trial, Dr. Anthony Urquiza testified as an expert in CSAAS. He testified that CSAAS is not a diagnostic tool, but was developed to educate therapists treating abused children by dispelling certain misperceptions about how such children might behave. There are five parts to CSAAS: secrecy, helplessness, entrapment and accommodation, delayed and unconvincing disclosure, and retraction or recantation. Not all five parts are present in every case. Secrecy refers to reasons why a child might not tell anyone about the abuse. Helplessness involves reasons why a child might not try to stop abuse as it is happening by fighting or yelling. Entrapment and accommodation refer to ways children may deal with being abused, including wearing extra pairs of pajamas to make molestation more difficult and disassociating from the abuse. Delayed or unconvincing disclosure explains why a child might wait to disclose the abuse or disclose it incrementally in different versions. Retraction or recantation refers to why a victim might retract an accusation. Dr. Urquiza did not know anything about appellant's case and did not opine on Natalie's testimony.

The trial court instructed the jury with respect to Dr. Urquiza's testimony as follows: "You have heard testimony from Dr. Anthony Urquiza regarding child sexual abuse accommodation syndrome. [¶] Dr. Urquiza's testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not Nathalie Doe's conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony."

B. *Admissibility*

Appellant challenges the admissibility of Dr. Urquiza's testimony. "We review the trial court's ruling on the admissibility of expert testimony for abuse of discretion." (*People v. Watson* (2008) 43 Cal.4th 652, 692.) "The erroneous admission of expert testimony only warrants reversal if 'it is reasonably probable that a result more favorable

to the appealing party would have been reached in the absence of the error.' " (*People v. Prieto* (2003) 30 Cal.4th 226, 247 (*Prieto*).)[5]

1. *Foundation*

Appellant argues the trial court's ruling finding a sufficient factual foundation for the testimony was in error. "Although inadmissible to prove that a molestation occurred, CSAAS testimony has been held admissible for the limited purpose of disabusing a jury of misconceptions it might hold about how a child reacts to a molestation." (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744 (*Patino*).)

Appellant first contends there was no delay in reporting the abuse because Natalie told Jocelyn about it the day after it happened; however, the trial court's pretrial ruling allowed CSAAS testimony about accommodation and intermittent disclosure, not delay, so this argument does not demonstrate error.

Appellant also argues there was no foundation for evidence regarding accommodation because the prosecution's motion represented that after the incident appellant "made himself extremely scarce around the house and Natalie rarely saw him." Nonetheless, Natalie continued to live—and sleep—in the same house as appellant, and the trial court did not abuse its discretion by concluding this was a sufficient foundation for testimony about accommodation.

Appellant next contends Natalie's disclosures were not inconsistent. Contrary to appellant's suggestion, CSAAS testimony may be relevant if disclosure of abuse was incremental, even if it was not inconsistent. (See *People v. Hernandez* (2011) 200 Cal.App.4th 953, 962 [" 'Delayed disclosure' reflects the fact that most abuse victims do

[5] Appellant argues the applicable prejudice standard is beyond a reasonable doubt because admission of the CSAAS testimony constituted vouching for Natalie's credibility and violated his constitutional right to a jury determination of all issues relating to guilt pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466. We disagree. Dr. Urquiza did not comment at all on Natalie's testimony and did not vouch for her credibility. Our Supreme Court has approved the use of syndrome testimony (*People v. Brown* (2004) 33 Cal.4th 892, 906-907 (*Brown*)) and its admission did not violate appellant's rights under *Apprendi*, *supra*.

not immediately disclose the abuse and, when they do, reveal only small details to see if the person to whom the information is disclosed is supportive."].) The prosecution's motion represented that Natalie "did not completely disclose the full details of her molestation during her initial disclosure to her sister and mother." Defense counsel did not object to this representation. The trial court's ruling that there was a foundation for CSAAS testimony on intermittent disclosure was not an abuse of discretion.

2. *Within the Knowledge of the Average Juror*

Appellant argues the misperceptions about child sexual assault victims that CSAAS testimony is intended to refute are no longer held by the average juror, and the testimony is therefore within the common experience of jurors. "As a general rule expert opinion testimony is limited to an opinion that is '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' (Evid. Code, § 801, subd. (a).) Because admissibility of expert opinion is a question of degree, and a jury need not be wholly ignorant of the subject matter under the statutory rule, exclusion is only necessary where the opinion would add nothing at all to the jury's common fund of information." (*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1110.) The trial court's conclusion that the testimony of an expert in the behavior of child sexual abuse victims would assist the jury was not an abuse of discretion. (See *Brown, supra,* 33 Cal.4th at p. 906 [discussing "common notions about domestic violence victims akin to those notions about rape and child abuse victims," which syndrome testimony is intended to address].)

3. *Case-in-Chief*

Appellant argues it was error to allow the prosecution to present the CSAAS testimony in its case-in-chief, rather than in rebuttal.

Appellant forfeited this argument by failing to object below. In any event, any error was harmless. Appellant has not identified any prejudice resulting from the introduction of this testimony during the prosecution's case-in-chief, and we are not persuaded a more favorable outcome was probable had the testimony been presented during rebuttal. (*Prieto, supra,* 30 Cal.4th at p. 247.)

4. *Not Tailored for Purpose Admitted*

Appellant argues the CSAAS testimony was not tailored to the purpose for which it was admitted; specifically, although the trial court only found the testimony admissible with respect to accommodation and intermittent reporting, Dr. Urquiza testified about all five parts of CSAAS.

Respondent argues appellant forfeited this argument by failing to object below; appellant contends the trial court had a sua sponte obligation to limit the testimony. We need not decide because any error was harmless. Dr. Urquiza's testimony about the other three parts of CSAAS was brief and general; moreover, to the extent these parts were inapplicable in this case, as appellant contends, there is little reason to think they influenced the jury. We find no reasonable probability a more favorable outcome would have resulted absent any error in the admission of this testimony. (*Prieto, supra,* 30 Cal.4th at p. 247.) For the same reason, we reject appellant's argument that trial counsel was ineffective for failing to object to Dr. Urquiza's testimony on these three CSAAS parts. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1030–1031 (*Cunningham*) [prejudice required for ineffective assistance of counsel claim "is established when the record demonstrates 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' "].)

C. *Due Process*

Appellant next argues admission of the CSAAS testimony violated his due process right to a fundamentally fair trial. Appellant contends such testimony "undermines and destroys the very purpose and function of cross-examination" because it effectively vouches for the victim witness' testimony by telling the jury any inconsistencies were the result of being a victim of abuse.

This argument was considered and rejected in *Patino, supra,* 26 Cal.App.4th 1737. That court first noted the argument "misconstrues the nature of CSAAS testimony. The purpose of CSAAS testimony was not to neutralize inconsistencies in the victim's testimony or in [other prosecution witnesses'] testimony. The primary purpose of CSAAS testimony was to show why the victim acted as she did. The testimony was

introduced to explain the state of mind of the complaining witness." (*Id.* at p. 1746.) Moreover, the defendant in *Patino*, like appellant, "engaged in a lengthy cross-examination of [the complaining witness]" and "explored inconsistencies in her testimony." (*Id.* at p. 1747.) We agree with the *Patino* court's conclusions that admission of CSAAS testimony "did not deprive appellant of his right to confrontation or his right to cross-examination" and that "introduction of CSAAS testimony does not by itself deny appellant due process." (*Ibid.*)

II. *Mistrial*

Appellant argues the trial court erred by failing to conduct a sufficient hearing on his motion for a mistrial. We disagree.

A. *Background*

After returning from a recess following the conclusion of Mother's testimony, defense counsel moved for a mistrial. Counsel represented that for several days during trial, the victim's family had been crying and hugging each other outside the courtroom door when the jurors exited. Counsel further represented that earlier that day, after Mother finished testifying, she was outside the courtroom sobbing "while the jury was going out past her." Counsel stated a man in "a sheriff's uniform" had appeared in court during Mother's cross-examination and was subsequently "hold[ing] [Mother] in his arms outside while the jury le[ft]" the courtroom.

The court initially denied the motion for a mistrial but offered to reinstruct jurors with CALCRIM No. 101.[6] The court also directed the uniformed man, Robert I., not to wear his uniform if he wanted to be a spectator at trial and "not to have any kind of emotional display with anybody associated with the trial."

The following day, the court sua sponte revisited the issue and held a hearing to determine what happened. Robert I. was the sole witness. Robert I. testified he was

[6] CALCRIM No. 101 provides, in relevant part, "Your verdict must be based only on the evidence presented during trial in this court and the law as I provide it to you"; and "You must not allow anything that happens outside of the courtroom to affect your decision [unless I tell you otherwise]."

Mother's boyfriend and was employed by the sheriff's department as a correctional officer.[7] He was working the previous day and came to trial in uniform during his work hours. After Mother's testimony, she left the courtroom and was comforted by friends and family. Robert I. sat on the bench next to her and "was rubbing her back a little bit." Robert I. did not believe the jurors could see this because the bench where they were seated would have been obscured by the open courtroom door. The trial court affirmed its prior ruling, stating, "I don't see that anything has been done that rises to the level of any prejudice against Mr. Hewitt."

The court subsequently instructed the jury: "You must disregard anything you saw or heard when the court was not in session, even if it was done or said by one of the parties or witnesses."

B. *Analysis*

" '[A] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' " (*People v. Jenkins* (2000) 22 Cal.4th 900, 985–986.) We review for abuse of discretion appellant's challenge that the trial court failed to conduct a sufficient hearing on his mistrial motion. (*Id.* at p. 985.)

Appellant has failed to demonstrate an abuse of discretion. Appellant argues Robert I. did not testify the jury did not see him rub Mother's back, but only testified he believed or assumed they did not see him because of the location of the bench and the courtroom door. However, the trial court could have determined this belief was sufficiently likely to be correct as to render questioning of the jurors unnecessary. The trial court could also have concluded that, even if jurors had witnessed the incident, any prejudice could be cured by the instruction to disregard events occurring when the court was not in session. No abuse of discretion has been shown.

[7] Although appellant characterizes Robert I. as the courtroom bailiff, the record is clearly to the contrary.

III. *Prosecutorial Misconduct*

Appellant argues various statements made by the prosecutor during closing arguments constituted prejudicial misconduct. We disagree.[8]

"It is misconduct for prosecutors to bolster their case 'by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it.' [Citation.] Similarly, it is misconduct 'to suggest that evidence available to the government, but not before the jury, corroborates the testimony of a witness.' [Citation.] The vice of such remarks is that they 'may be understood by jurors to permit them to avoid independently assessing witness credibility and to rely on the government's view of the evidence.' [Citation.] However, these limits do not preclude all comment regarding a witness's credibility. ' " '[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.' " ' [Citation.] '[S]o long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," her comments cannot be characterized as improper vouching.' " (*People v. Bonilla* (2007) 41 Cal.4th 313, 336–337.) " 'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' " (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1403 (*Spector*).)

[8] The parties dispute whether appellant forfeited this challenge by failing to object below. We need not decide this issue because we reject the challenge on the merits.

A. *Detective Hand's Search Warrant Testimony*

One of the prosecution witnesses was Detective Ben Hand. Hand testified on direct examination that appellant's computer was not searched for pornographic materials; when asked why he had not sought a search warrant to do so, he responded, "in this case, there was no reference to the defendant possessing child pornography. And there was also no relationship to a computer or an online relationship of any kind. [¶] So it -- I didn't think it was necessary. And I didn't think any judge would ever grant a search warrant for such an item." On cross-examination, redirect, and recross, the parties explored at length the reason Hand did not seek a search warrant.

Defense counsel revived this issue during closing arguments, arguing Hand's testimony that he could not have gotten a search warrant was "contrived," "manufactured," and "false." Defense counsel argued Hand simply made a mistake in failing to seek a warrant to search appellant's computer. In rebuttal, the prosecutor argued, "When [defense counsel] tells you that Detective Hand and I manufactured evidence, that is a lie. That is not true." She continued: "He is suggesting to you that in order to get Mr. Hewitt convicted on evidence that we know is faulty, Detective Hand and I risked our careers. . . . Presenting false evidence would certainly not be allowed to be presented to you if anybody knew about it. We would both be fired from our jobs if we were caught doing that. [¶] . . . Do you think for one moment that if there was one hint, one drop, one touch of evidence that we had done anything wrong, that we would still be standing here?" She later added, "Do you think, ladies and gentlemen, for one moment that if that [the reason for not getting a warrant] was a lie we made up, that there would not have been an instantaneous response that would have shown you that I'm an incompetent and lying prosecutor who this judge is allowing to present false evidence to you?"

Appellant argues these statements constituted prejudicial misconduct because the prosecutor was vouching for herself and Detective Hand. We need not decide whether the statements were improper because any error was harmless. The challenged argument related to an entirely tangential issue—the reason why police did not attempt to search

appellant's computer for pornography. Appellant contended the police's failure to do so was an oversight; Hand testified he could not have obtained a search warrant. This testimony was not critical evidence in this case; accordingly, any error was harmless. (*People v. Frye* (1998) 18 Cal.4th 894, 976 (*Frye*) ["we conclude there is no reasonable probability the jury was influenced by the prosecutor's reference [during closing arguments] to undisclosed evidence to defendant's detriment"], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390.)

B. *Natalie's Pretext Calls*

In rebuttal, the prosecutor conceded "that some of the circumstances surrounding this incident are unusual." She continued, "that's probably why, combined even with a few of the early sort of ambiguous statements of admissions in the pretext reports, despite the fact that Natalie had such a compelling story, Detective Hand was feeling compelled to reject the case. If she hadn't come forward and done the pretext call that was so compelling in this case, that's what he told you. He was waiting because he was over-busy. He hadn't yet rejected the case. He didn't think it was provable to a jury. But that came in. She came back of her own free will. She decided she finally got the courage to get up and do it." Appellant contends this argument relied on facts not in the record: first, that Natalie's decision to make the pretext calls was motivated by courage; and second, that Detective Hand moved ahead with the case because he was impressed and moved by this courage.

We disagree that the first argument relied on facts outside the record. Natalie testified that she initially did not want to make pretext calls because she "didn't want to hear his voice" and was scared, but she later decided to make them because "if we hadn't done it, we wouldn't have had enough evidence to continue." The evidence that Natalie overcame her fear of making pretext calls in order to support the criminal case against appellant gives rise to an inference that she was courageous in doing so.

As for the second argument, we disagree with appellant's characterization of the prosecutor's argument. The prosecutor did not argue Detective Hand pursued the case because he was impressed by Natalie's courage, but rather because he felt the evidence

resulting from her pretext calls was substantial: "Detective Hand was feeling compelled to reject the case. If [Natalie] hadn't come forward and done the pretext call that was so compelling in this case . . . ." To the extent this argument was not supported by inferences from the record, it was harmless as the reasons behind Hand's pursuit of the case were not material.

C. *Mother*

Defense counsel argued: "[O]ne of the instructions talks about one of the things that you should consider in considering whether you believe a witness or not, is their demeanor while testifying. And you saw with your own eyes, as did I, that [Mother], at times when His Honor was politely instructing her to answer the question, be responsive, she shot looks at him with her eyes. She rolled her eyes at him, like, oh, how dare you. Oh, okay. Wow. Wow. What an utter lack of respect. [¶] It's one thing to roll her eyes at me when I properly object, but when she's shooting these dirty looks at the judge because he simply says to her, ma'am, you have to answer the question, should cause you to question, is this a person I can believe? If she shows so little respect for the judge, you must say to yourself, is that the demeanor of someone that I should trust? I mean, her demeanor showed her to be someone who simply would do or say anything to get her way . . . ." Defense counsel later reiterated, "[Mother] is not a reliable witness. Reliable forthright witnesses don't make faces at judges. Reliable, forthright witnesses answer questions directly."

In rebuttal, the prosecutor argued the following: "I want to talk to you about [Mother] and what happened to her here in the courtroom. I absolutely cannot agree more with [defense counsel] when he tells you that cross-examination is one of the most powerful engines for the pursuit of truth in the world. I totally agree with it. I think our system of justice is amazing. I think it is unique in all the world. I have a place in that system that I am proud of, that means everything to me. I think we do good work, all of us together, all of us together. I think we do important things every single day. We don't cheat. We don't lie. We don't perjure ourselves. We don't create evidence, and we don't put on lying witnesses. If we do, we get fired. We get disbarred. And we never

get to do this job again. It's very, very insulting, and it's more than insulting. He's essentially accusing us of crimes to our profession."

The prosecutor continued: "Let me tell you, ladies and gentlemen, that didn't happen, and we don't take that lightly. That is about as insulting as it can get. And I'll tell you the truth is that's how I know how [Mother] must have felt, the day that she was subjected to cross-examination that I have never seen before. Yes, he has a right. He has an obligation, a duty to cross-examine her. But that cross-examination was brutal, and you know it was. And I think she held herself pretty well. Of course, she was crying and sobbing. Of course, she couldn't keep it together. Of course, the judge was concerned because she was not being able to find a way to string her sentences correctly. Her mind was off in who-knows-where land with what she was facing. [¶] She was trying to tell her story. It wasn't working the way she wanted. She wasn't disregarding or disrespecting the system. She was doing the best she could. If she was disregarding and disrespecting the system, the judge would have taken her off the stand."

Appellant argues the first set of statements constituted vouching for the prosecutor's own credibility, and the statement that "we don't put on lying witnesses" could not be construed as "we don't knowingly put on lying witnesses." We disagree. The prosecutor referred to the "system of justice" in which "we do good work, all of us together, all of us together," and characterized putting on a lying witness as a "crime[] to our profession." Read in context, the prosecutor's statements that "we don't put on lying witnesses" is most reasonably understood as referring to the legal profession as a whole, not solely to the prosecutor's office, and as meaning all lawyers, not just prosecutors, do not knowingly put on lying witnesses. " '[W]e "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements' " (*Spector, supra,* 194 Cal.App.4th at p. 1403), and we decline to do so here.

With respect to the second set of statements, appellant argues the prosecutor's statement that she had never witnessed such a cross-examination in her career relied on facts not in evidence. Though the argument was improper, any error was harmless: the prosecutor could argue that the cross-examination was grueling, whether it was also

unlike any other she had seen in her career was not a factor likely to influence the jury. (*Frye, supra,* 18 Cal.4th at p. 976.) Appellant also contends the prosecutor's argument that the trial court would have taken Mother off the stand if she had been disregarding or disrespecting the system relied on facts not in evidence and was not accurate. We agree, but find the error harmless. The jurors witnessed Mother's testimony and were instructed on the factors to consider when assessing her credibility. Whether the trial court would have removed her for being disrespectful was not likely to influence the jury's verdict. (*Ibid.*)

IV. *Late Disclosed Evidence*

Appellant argues his trial counsel rendered constitutionally ineffective assistance by failing to investigate late disclosed evidence. We disagree.

A. *Background*

On the last day of evidence at trial, the prosecution disclosed the existence of a taped interview of Jocelyn conducted in October 2011. The prosecutor explained a "catastrophic" computer failure had prevented her from knowing about the interview's existence earlier. The trial court offered defense counsel the opportunity to review the interview and recall Jocelyn. Defense counsel declined to even view the tape, stating, "I don't want family members back in here anymore, even though it certainly appears to me there is impeaching information." Defense counsel instead sought a jury instruction advising the jury there was late discovery, which the trial court provided.

After the jury's verdict but before sentencing, appellant replaced his trial counsel. His new counsel moved for a new trial on the ground, inter alia, that prior trial counsel provided ineffective assistance in failing to review the late disclosed interview. The motion attached a transcript of the interview.[9] The trial court rejected the motion, finding "the result had he done that investigation still would not have resulted . . . in a different result . . . ."

[9] The attached transcript was transcribed by appellant's new counsel. The People have not objected to the transcript or argued it is inaccurate.

B. *Analysis*

To prevail on an ineffective assistance of counsel claim, a "[d]efendant must establish not only that there was ineffective representation that fell below an objective standard of reasonableness, but also that prejudice resulted. [Citations.] Prejudice is established when the record demonstrates 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*Cunningham, supra,* 25 Cal.4th at pp. 1030–1031.)

We need not decide whether counsel's performance was deficient because, assuming such deficiency, any error was harmless. In the late-disclosed interview, Jocelyn made statements suggesting that Natalie did not tell her about the incident immediately after it happened and that Natalie told friends, possibly before she told Mother. However, Jocelyn's trial testimony was not a significant piece of evidence against appellant. Instead, as the prosecutor emphasized in closing arguments, Natalie's testimony and appellant's statements during the pretext calls were the heart of the prosecution's case. There is no reasonable probability that cross-examination of Jocelyn based on the late-disclosed interview would have resulted in a more favorable verdict.

V. *Cumulative Error*

Appellant contends the cumulative impact of the above errors deprived him of a fair trial. We have either rejected appellant's claims of error or found that any errors, assumed or not, were not prejudicial. "Viewed as a whole, such errors do not warrant reversal of the judgment." (*People v. Stitely* (2005) 35 Cal.4th 514, 560.)

VI. *HIV Testing*

At sentencing, the trial court ordered appellant to undergo AIDS testing under section 1202.1. Section 1202.1 provides that upon conviction of a violation of section 288, a defendant shall be ordered to submit to testing "for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS)" "if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim."

(§ 1202.1, subds. (a), (e)(6)(A)(iii).) Appellant argues the trial court's order lacks the requisite probable cause because there is no evidence bodily fluids were transferred from appellant to Natalie.

Appellant failed to object to the order below. As the People concede, appellant can nonetheless raise the challenge on appeal. (*People v. Butler* (2003) 31 Cal.4th 1119, 1123.) Appellant asks us to strike the challenged order. However, our Supreme Court has concluded "it would be inappropriate simply to strike the testing order without remanding for further proceedings to determine whether the prosecution has additional evidence that may establish the requisite probable cause." (*Id.* at p. 1129.) Accordingly, we will remand the matter.

DISPOSITION

The order requiring appellant to submit to testing pursuant to section 1202.1 is vacated and remanded for further proceedings consistent with this opinion, at the election of the prosecution. In all other respects, the judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.